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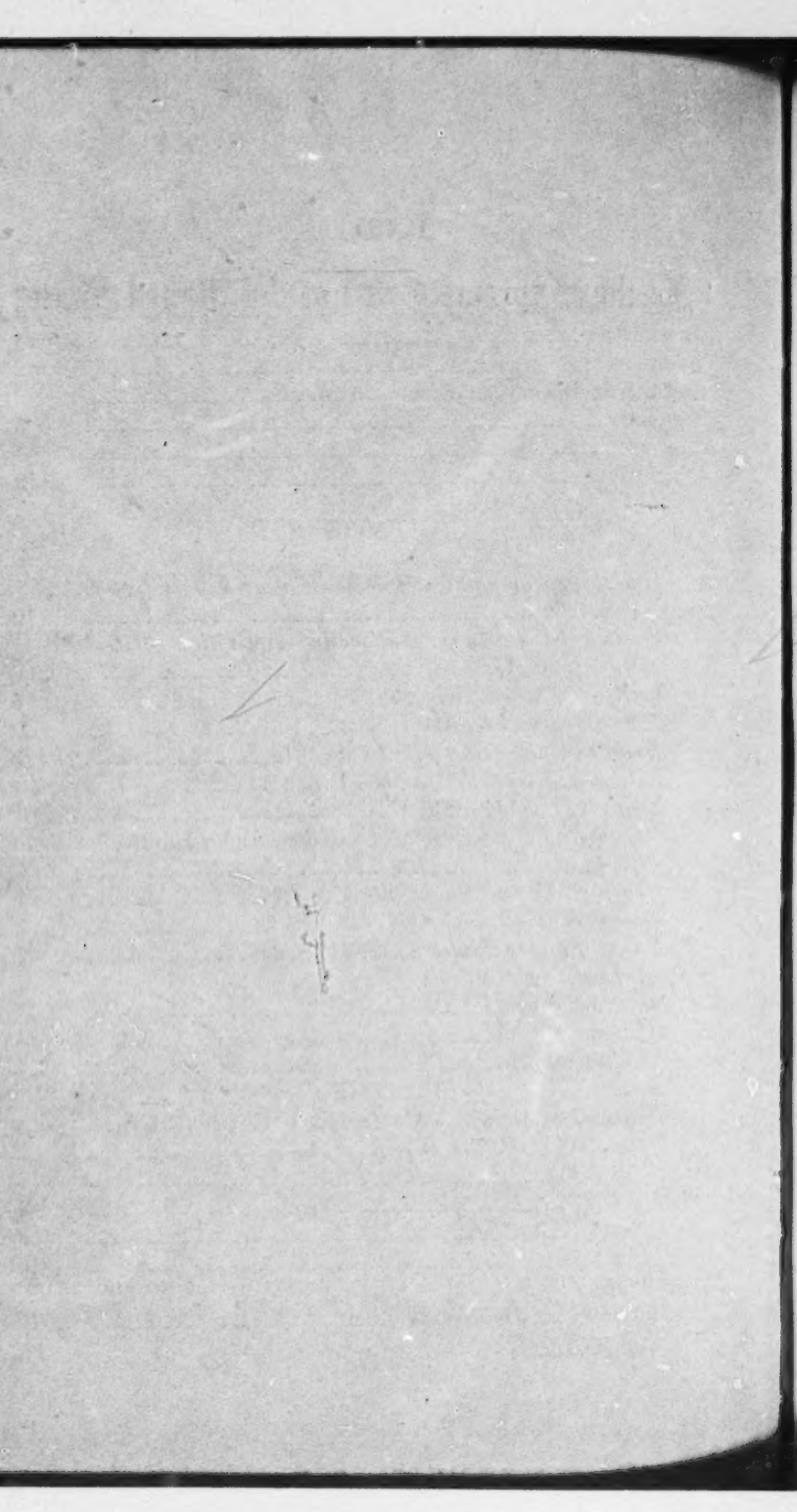
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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 265

**WILLIAM ALBERTSON AND ROSCOE QUINCY PROCTOR,
PETITIONERS**

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUM-
BIA CIRCUIT**

**BRIEF FOR THE RESPONDENT IN OPPOSITION WITH REGARD
TO PETITIONER PROCTOR¹**

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, pp. 19-31) is reported at 332 F. 2d 317.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1964 (Pet. App. B, pp. 32-33). The petition for a writ of certiorari was filed on July 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

¹The government is filing separately a "Memorandum for the Respondent Suggesting That the Cause Is Moot With Regard to Petitioner Albertson."

QUESTIONS PRESENTED

The Subversive Activities Control Act of 1950 provides for the registration of any member of an organization which has been found by the Subversive Activities Control Board to be a "Communist-action organization" and which itself has failed to register under the Act. The Communist Party has been found to be such an organization, but has not registered. Petitioner Proctor was found by the Board to be a member of the Communist Party and was ordered to register. The questions presented are:

(1) Whether the order directing petitioner to register violates his privilege against self-incrimination under the Fifth Amendment.

(2) Whether petitioner was denied the right to trial upon indictment, by a jury, and after judicial proceedings because these procedures were not afforded him concerning the issue whether the Communist Party is a "Communist-action organization" within the meaning of the Act.

(3) Whether petitioner was subjected to a bill of attainder or was denied procedural due process because he could not relitigate before the Board its prior finding as to the character of the Communist Party.

(4) Whether the registration provisions violate the First Amendment or substantive due process protected by the Fifth Amendment.

STATUTE, REGULATIONS, AND FORMS INVOLVED

The pertinent provisions of the Subversive Activities Control Act, 64 Stat. 987, 50 U.S.C. 781, *et seq.*, and

the registration forms prescribed by the Attorney General under it, are set forth in the Petition for Certiorari, App. C, pp. 34-42.

STATEMENT

The Attorney General began this proceeding against petitioner Proctor by filing a petition with the Subversive Activities Control Board for an order requiring him to register as a member of a Communist-action organization, *i.e.*, the Communist Party. The petition alleged that: (1) a final order requiring the Communist Party to register under Section 7(a) of the Act as a Communist-action organization was in effect; (2) more than sixty days had elapsed since the order became final, but the organization had not registered with the Attorney General; and (3) petitioner was a member of the Communist Party and was therefore required to register with the Attorney General under Section 8 of the Act, but had failed to do so (J.A. 30-32).

After full hearings—at which petitioner Proctor presented no evidence—the Board found that he had been a member of the Party at least since 1959² (J.A. 50). The Board also found that he had been elected to the National Committee at the national convention in 1959 and to the Northern California District Committee in 1960 (J.A. 49). The Board therefore ordered him to register. The court of ap-

² The Board in making its determination applied the definition of membership approved by this Court in *Killian v. United States*, 368 U.S. 231, 247.

peals upheld this order, as well as a similar order involving petitioner Albertson.²

ARGUMENT

The court of appeals was correct in refusing, as premature, to consider petitioner's claims that the Board's order violated his rights under the self-incrimination clause of the Fifth Amendment and that the Board's refusal to allow him to relitigate the status of the Communist Party as a Communist-action organization denied him the right to trial by jury, the right to an indictment, and a judicial trial. In any event, those claims, as well as petitioner's other contentions, are without substance on their merits.

1.a. In *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 105-110, this Court held, in a case involving an order of the Board directing a Communist-action organization to register under the Act, that the claim that such registration would require the organization's officers to incriminate themselves was premature even though a subsequent refusal to register might subject them to cumulative penalties. The Court explained that (*id.* at 107):

The privilege against self-incrimination is one which normally must be claimed by the individual who seeks to avail himself of its protection. * * * We cannot know now that the Party's officers will ever claim the privilege. * * * If a claim of privilege is made, it may or may not be honored by the Attorney General. We can-

² The parties in 21 other similar cases stipulated that the same judgment should be entered in those cases as the court of appeals entered in the *Albertson* and *Proctor* cases.

not, on the basis of supposition that privilege will be claimed and not honored, proceed now to adjudicate the constitutionality under the Fifth Amendment of the registration provisions. Whatever proceeding may be taken after and if the privilege is claimed will provide an adequate forum for litigation of that issue.

Petitioner argues that the situation here is different from the *Communist Party* case because the Party's officers were not parties to the action and no actual claim of privilege had been made by them. It is true that petitioner is the person who would be entitled to make the claim and that he asserted the claim before the Board and in the court below. However, until the order in this case becomes final, the claim is premature because petitioner is not yet under the compulsion of the criminal laws to register. At that time, he may or may not choose to register. If he refuses, the Attorney General, depending on the circumstances of the claim, may or may not honor the claim of privilege. In short, here, as in the *Communist Party* case, litigation of this question must await the time, if ever, when petitioner is actually compelled to register, refuses, and the government prosecutes him for such refusal.

b. Petitioner contends (Pet. 17-18) that he was denied the right to trial upon indictment, before a jury, and in full judicial proceedings because the Act does not afford him these procedures with regard to the question whether the Communist Party is a Communist-action organization. However, this issue is also premature. Petitioner has merely been ordered

by an administrative agency to register, in part on the basis of a previous administrative order. Before petitioner may be penalized for violating this order he is entitled under the Act to a full judicial criminal trial. Whether the Constitution requires that the character of the Communist Party be relitigated as one of the issues in such a trial—with of course all the protections of the Fifth and Sixth Amendments—may properly be determined if such proceedings are ever brought.⁴

2. In any event, the Act's provisions for the registration of members of groups determined to be Communist-action organizations, in the absence of registration by those organizations themselves are constitutional.

a. The Act does not unconstitutionally deprive petitioner of his Fifth Amendment privilege against self-incrimination. Section 4(f) of the Act provides that the fact of registration may not be used as evidence in any prosecution for violation of any criminal statute. As this Court's recent decision in *Murphy v. Waterfront Commission*, decided June 15, 1964, makes clear, a person may be required to give information that would otherwise incriminate him if the information cannot be used against him, even though he is not given complete immunity from prosecution. Since the purpose of Section 4(f) was to

⁴ As the court of appeals recognized, however (cf. Pet. App. A, p. 27, note 6, with Pet. App. A, p. 31), the issue whether petitioner was subjected to a bill of attainder or was denied procedural due process because he was not allowed to relitigate the character of the Communist Party before the Board is not premature. We discuss this issue at pp. 8-11 below on the merits.

meet criticism that the Act might be unconstitutional under the Fifth Amendment, it is clear that Section 4(f) also applies to prosecutions under other provisions of the Act itself, such as those involving employment and labeling of publications.

While Section 4(f) does not grant complete immunity in that it does not bar use of registration statements for leads to other evidence, such use assumes that the evidence was previously unknown. See *Heike v. United States*, 227 U.S. 131, 143. The evidence before the Board demonstrated that the Attorney General already had reason to believe that petitioner was a Party member. Since the mere fact of registration could not provide the Attorney General with any new leads, it could not incriminate petitioner. *Rogers v. United States*, 340 U.S. 367, 372; *Curcio v. United States*, 354 U.S. 118, 124.

Petitioner suggests (Pet. 9-10) that the answers to certain questions on the registration form would be incriminating. However, a person may not refuse to register or to answer any questions because some questions might incriminate him. *United States v. Sullivan*, 274 U.S. 259, 263; *United States v. Kahriger*, 345 U.S. 22, 32. If the member finds that answering a particular question in the registration statement might incriminate him, he can note his refusal to answer that question and thereby claim his privilege.⁵

⁵ Moreover, contrary to petitioner's suggestion (Pet. 10, 13), the registrant does not admit that the organization to which he belongs is a Communist-action organization. Indeed, that finding has already been made by the Board and is not even in issue in this proceeding or in any proceeding involving the disabilities under the Act. See below pp. 8-11.

b. Petitioner was not denied the right to an indictment, trial by jury, or a full judicial trial because he was not provided those procedures upon the issue whether the Communist Party is a "Communist-action organization" within the meaning of the Act. Nor was he subjected to a bill of attainder or denied due process because he was not allowed to relitigate the issue before the Board.

Petitioner's contention that he is entitled to a full criminal trial on this issue is inconsistent with basic principles of administrative law. Since the Board's order to register is of course not itself a criminal penalty, it can be imposed pursuant to an administrative hearing. When and if petitioner refuses to obey the order without legal reason (such as the Fifth Amendment), he will be tried for the crime of refusing to obey such an order. It will be irrelevant whether some error was committed in originally issuing the order; it will be enough that petitioner has failed to obey a final order. On this issue, petitioner will of course have the full protection of the Fifth and Sixth Amendments. But he will not be able to relitigate the validity of the order any more than can a person who violates an order of the Federal Trade Commission or Interstate Commerce Commission.

Petitioner was likewise not denied procedural due process by the Board's refusal to permit him to relitigate its earlier finding that the Party is a Communist-action organization. The requirement of personal registration does not turn on whether an organization is in fact a Communist-action organization. The Act provides that if a final order requires an organiza-

tion to register and it does not do so, members of the organization are required to register themselves. The only real issue concerning these requirements is whether, as a matter of substantive due process, members of organizations can be required to assume obligations of their organizations. We submit that, when, as this Court has held with regard to the Communist Party, an organization may properly be ordered to register, the obligation to register himself may be imposed on each member on the basis of this finding.

In addition, treating petitioner's argument as properly involving procedural due process, this Court has held that "due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation." *Moyer v. Peabody*, 212 U.S. 78, 84. The tortuous history of the litigation in the *Communist Party* case (see 367 U.S. at 19-22) demonstrates the total impracticability of permitting in each case involving members of the Communist Party the relitigation of the status of the Party as a Communist-action organization.

Moreover, in the litigation resulting in the final order requiring it to register, the Communist Party may be fairly said to have represented its members. As this Court stated in *Hansberry v. Lee*, 311 U.S. 32, 42-43, "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present * * *, or where for any other reason the relationship between the parties present and those

who are absent is such as legally to entitle the former to stand in judgment for the latter." Accord, Re-statement, *Judgments* (1942), § 86. Regardless of the rule in the absence of statute, at the least Congress' determination to have the Communist-action organization alone litigate its own character under the Act is not so unfair as to violate due process.

There is no merit to petitioner's suggestion (Pet. 15-16) that he was entitled to relitigate the Party's present status because the Board's finding related to 1953. This Court implicitly rejected a similar contention in upholding the constitutionality of the non-Communist affidavit provision of the Labor Management Relations Act. *American Communications Assn. v. Douds*, 339 U.S. 382. That provision applied specifically to all members of the Communist Party, and there was no opportunity for members to litigate the character of the Party at the time of their failure to register. In view of the grave danger the Communist movement poses to national security and its secret and conspiratorial character, Congress could reasonably decide that once the Board had determined after full proceedings that a particular organization is a Communist-action organization, that finding is binding in subsequent proceedings to compel individual members of the organization to register. Moreover, Congress has provided a means by which the Communist Party itself can relitigate its status. Section 13(b) of the Act; see *Communist Party v. Subversive Activities Control Board*, *supra*, 367 U.S. at 87.

The fact that the Board's finding as to the Communist Party rested partially on the Party's activities before the passage of the Board does not make the Act a bill of attainder. As this Court stated in the *Communist Party* case, 367 U.S. at 86, "[T]he singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons." The Court held that the Act was not an attainder as to the Communist Party because it was a regulatory statute which applied to present activities rather than to particular organizations or individuals. *Id.* at 83-88.⁶ Since the Court was fully aware that the Board's finding was based in part on activities which occurred before the Act was passed (see 367 U.S. at 29, 42-54, 69), this holding is controlling on petitioner's contention.⁷

c. In the *Communist Party* case, this Court held that the Act's provisions requiring the registration of Communist-action organizations, which includes listing their members, do not violate the First Amendment. 367 U.S. at 88-105. This holding fully

⁶ It is likewise clear that the Act is not an attainder as to petitioner. The order to register is not punishment, the Act does not name petitioner, and he is required to register only because he, unlike petitioner Albertson, has continued to be a member.

⁷ If the registration requirement is not invalid under the First Amendment which is the specific provision relating to the rights of speech and assembly, it is surely not invalid under the general provisions of the Fifth Amendment. See also the opinion of the court of appeals, Pet. App. A, pp. 28-29.

applies to the provisions relating to members of Communist-action organizations. Here, petitioner has been ordered to register because the Communist Party has not itself registered. If Congress has the power to compel the Party itself to register, it can compel its members to register when the Party does not act.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari, insofar as it relates to petitioner Proctor, should be denied.

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AUGUST 1964.

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